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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 304

AMERICAN AIRLINES, INC., ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 13a–39a) is reported at 359 F. 2d 624. The order of the Civil Aeronautics Board (Pet. App. C, 42a–44a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, 40a–41a) was entered on March 2, 1966. On May 14, 1966, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including June 30, 1966. The petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, in promulgating a rule authorizing all-cargo carriers alone to offer "blocked space" cargo service, exceeded its rule-making authority.

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, are set forth in Appendix D to the petition for certiorari.

STATEMENT

Following a rule-making proceeding, the Civil Aeronautics Board adopted a regulation authorizing all-cargo carriers, but not combination (passengers plus cargo) carriers, to offer "blocked space" air cargo service. The regulation permits a shipper to contract at wholesale rates for a specified amount of cargo capacity (which must be paid for whether or not actually used) aboard a particular carrier's all-cargo aircraft on a regularly recurring schedule for a period of 60 days or more. Pursuant to this regulation, the Board rejected tariffs for "blocked space" service filed by petitioners—the three largest combination carriers—while permitting a similar tariff filed by the Slick Corporation, an all-cargo carrier, to go into effect pending an investigation by the Board of the legality of the rates proposed in Slick's tariff. The background of the regulation is as follows.

The distinction between combination and all-cargo carriers has been recognized for regulatory purposes,

ever since the Board certified a group of all-cargo carriers to serve as specialists in this field some twenty years ago.[1] In November 1962, the Board instituted a rule-making proceeding to consider, among other questions, what volume and types of charter flights each class of carrier should be authorized to furnish. In January 1964, the Board published a supplemental notice of rule-making (J.A. 115), which proposed a regulation "to delineate the roles of the all-cargo and supplemental carriers and to establish a policy favoring the purchase from all-cargo carriers of blocked space at wholesale rates by the combination carriers."

Numerous comments were submitted in response to this notice (J.A. 129–35). However, before the Board took any further action in this proceeding, Slick[2] filed a tariff for blocked-space service between New York and Los Angeles and New York and San Francisco, under which substantial rate reductions would be allowed shippers who contracted for a specified amount of space on specified flights every week for 90 days or more. Petitioners filed complaints challenging the legality of Slick's tariff on various grounds, and asking the Board to suspend and in-

[1] *Air Freight Case*, 10 C.A.B. 572, affirmed *sub nom. American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C. 1951). The history of the all-cargo industry is traced in *Domestic Cargo-Mail Service Case*, 36 C.A.B. 344, 352–355.

[2] Slick suspended its scheduled operations on September 1, 1965 (C.A.B. Order Nos. E–22588, August 27, 1965; E–23352, March 14, 1966). Airlift International, Inc., has applied for the transfer of Slick's certificate to it. At the present time there is only one all-cargo carrier, The Flying Tiger Line, that can offer blocked-space service on the New York-Los Angeles and New York-San Francisco routes Slick formerly served.

vestigate it. They also filed assertedly "defensive" blocked-space tariffs of their own, duplicating Slick's in most respects. Slick, in turn, asked the Board either to reject these tariffs or to suspend and investigate them.

While these tariff proceedings were pending, the Board issued a further supplemental notice of proposed rule-making (J.A. 137), inviting oral argument on whether all-cargo carriers should be "permitted to sell blocked space at wholesale rates to air freight forwarders and other large volume shippers." The all-cargo carriers proposed that they alone should be authorized to offer blocked-space service; petitioners and other combination carriers vigorously opposed (J.A. 149–171).

On August 7, 1964, the Board issued its Regulation No. PS–24 (J.A. 74–80; 14 C.F.R. § 339.37), announcing a policy of permitting all-cargo carriers, but not combination carriers, to provide blocked-space service to combination carriers, air freight forwarders, and large-volume individual shippers.[3] In an accompanying statement of the basis and purpose of the rule, the Board observed that differences in the service and function of combination and all-cargo carriers were inherent in the terms of their certificates and their operating responsibilities thereunder. A

[3] Blocked-space service was defined as

> the carriage of property *in all-cargo aircraft* at wholesale rates pursuant to an effective tariff stating a rate applicable only when the user reserves and agrees to pay for a specified amount of space or lift on a regularly recurring basis for a period of not less than 60 days. [Emphasis added.]

logical and practical means for further delineating the role of all-cargo carriers, the Board reasoned, was to encourage their development as specialists for large-volume air freight service in all-cargo aircraft. However, while blocked-space service had a substantial potential for attracting to air freight substantial volumes of bulk traffic now moved by surface carriers, its potential could be realized only if new techniques were developed for handling such traffic with greater efficiency and lower costs, and this was likely only if the number of carriers taking part in blocked-space service was limited in its experimental stage. For this reason, the Board found it should be restricted to all-cargo carriers "at this time." This would not injure the combination carriers, for the diversion of existing traffic from those carriers would probably not be significant and they might be expected to acquire an increasing share of small-package shipments.

The Board had previously suspended, and ordered an investigation of, the blocked-space tariffs filed by Slick and petitioners. Following the issuance of its blocked-space regulation, it lifted its suspension of Slick's tariff, although continuing the investigation.[4] Shortly afterwards, the Board issued the order under review rejecting the blocked-space tariffs of petitioners on the ground that under the new regulation they were not authorized to provide this service (J.A. 94-7).

[4] The Flying Tiger Line subsequently filed a blocked-space tariff, and the Board similarly ordered an investigation (which is still pending) while allowing it to be put into effect.

The Board denied petitions for reconsideration by petitioners and others (Order E–21447, October 26, 1964, p. 4), stating that, on balance, the air transportation system as a whole would be benefited by giving all-cargo carriers the exclusive right to provide blocked space service at the present time. However, it stated, "we must stress * * * that our policy on blocked-space service is not an immutable one. We have acted in the light of the present and reasonably foreseeable circumstances. The policy is thus subject to amendment as the blocked-space experiment develops, and we, of course, retain our power to issue waivers under appropriate circumstances."[5]

On petitioners' suit for review, a panel of the court of appeals reversed the Board's order rejecting petitioners' tariffs, holding, with one judge dissenting, that it amounted to a modification of their certificates without compliance with the hearing requirements of Section 401(g) of the Act, 49 U.S.C. 1371 (Pet. App. D, 50a, Pet. App. A, 1a–12a). On rehearing *en banc*, the court, divided 5–3, sustained the Board. It held that the Board's action did not amount to a modification of the combination carriers' certificates; that the Board's distinction between combination and all-cargo carriers had a rational basis; and that the Board's action was a valid exercise of its power to make reasonable classifications of carriers and rules regulating them under Sections 204 and 416 of the Act, 49 U.S.C. 1324, 1386 (Pet. App. D, 55a, Pet. App. A, 13a–31a).

[5] Two members of the Board dissented, as they had from each of the prior orders in the case, questioning both the legality and the wisdom of the Board's policy.

Pointing out that the considerations that had moved the Board to adopt its policy were broadly legislative in nature, and did not rest on any evaluation of the merits or demerits of individual carriers, it ruled that use of rule-making procedures was entirely appropriate. Finally, it noted that the petitioners would have an adequate remedy in the courts if the assumptions on which the Board's policy was based changed and the Board refused to take appropriate action to modify it (Pet. App. A, 30a–31a).

ARGUMENT

The action of the Board in promulgating a rule that permits only all-cargo carriers to offer blocked-space service was reasonably found by the court below to be within the Board's broad rule-making power. Further review, we submit, is not warranted.

1. The Board has statutory responsibility for the promotion, development and regulation of civil aviation (49 U.S.C. 1302), and, to this end, it may exercise broad rule-making powers (49 U.S.C. 1373) and, specifically, it may classify air carriers according to the service they perform and define distinctions among classes (49 U.S.C. 1386(a)). This is what the Board did here. To encourage adoption of efficient methods of freight transportation, and thereby increase competition in this field by air carriers, the Commission has authorized the blocked-space experiment, initially limiting it to the all-cargo carriers so that they will have an inducement to exploit the service to the maximum. This kind of regulation is, we submit, within the normal scope of agency rule-making.

It is uniform and general in its application, legislative and prescriptive rather than judicial in its character. It is similar to many rules that have been upheld by the courts.[6]

Petitioners argue that the blocked-space rule effects a modification of the rights granted in the certificates under which they operate, and that therefore adjudicatory procedures—prescribed in the Act for modification proceedings—were necessary. The argument is without merit. Their certificates do not authorize—or even mention—blocked-space service, nor did combination carriers attempt to provide it until a blocked-space tariff was proposed by an all-cargo carrier.

To be sure, combination carriers are authorized to carry freight between the points specified in their certificates; but they retain this authority under the rule. Nor is there the slightest indication that any of their freight operations will be impaired because

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[6] See, *e.g.*, *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 39–44 (regulations prohibiting specified types of pricing clauses widely used in natural gas contracts); *American Trucking Associations* v. *United States*, 344 U.S. 298 ("trip-leasing" regulations applied to some classes of carriers but not others); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (regulations requiring extensive modification in existing radio networks' contracts); *United States* v. *Storer Broadcasting*, 351 U.S. 192 (multiple ownership of radio stations restricted by regulation); *Air Line Pilots Association* v. *Quesada*, 276 F. 2d 892 (C.A. 2), affirmed, 286 F. 2d 319 (C.A. 2), certiorari denied, 366 U.S. 962 (licensed pilots over 60 barred by regulation from piloting transport aircraft); *Capitol Airways* v. *Civil Aeronautics Board*, 292 F. 2d 755 (C.A.D.C.) (supplemental carriers handling military charters required to obtain individual exemptions from restriction on operating authority in lieu of prior blanket exemption).

competing air carriers will be offering blocked-space service. Since October 20, 1964, when blocked-space regulation became effective (Pet. App. A, 14a, n. 3), there has been little blocked-space traffic and no significant diversion of cargo business from petitioners (Pet. App. A, 31a), whose ability to compete for air-freight traffic has not been discernibly affected.[1] The court below has expressly preserved petitioners' right to reopen the issue of their exclusion from blocked-space service if petitioners' cargo service is impaired (Pet. App. A, 30–31a). In addition, petitioners have intervened in the still-pending investigation of the Flying Tiger and Slick blocked-space tariffs. There they will have full opportunity to object that the rate levels of those tariffs prevent them from providing their certificated service.

2. Petitioners also contend that the Board committed procedural errors in promulgating its rule. The court below, however, observed that "the procedure followed by the Board *admittedly* complies fully with the requirements for rule making established in Section 4 of the Administrative Procedure Act" (Pet. App. A, 15a; emphasis added). Petitioners' brief below made no argument that the Board's procedure was deficient. Their attempt to raise this issue now

[1] On the basis of official reports filed with the Civil Aeronautics Board by the carriers, it appears that in the year ending in May 1964 petitioners carried 57.9 percent of the nation's air freight, while the principal all-cargo operators (Slick and Flying Tiger) carried 16.8 percent. In the year ending in May 1966, nineteen months after implementation of the blocked-space regulation, petitioners' share of the air-freight market had *increased* to 62.9 percent, while the all-cargo carriers' share had *declined* to 13.3 percent.

is, we believe, belated. In any event, the record shows clearly that petitioners in fact had adequate notice—and actual knowledge—that one of the issues before the Board in the rule-making proceeding was whether the all-cargo carriers should be given exclusive blocked-space rights,[8] and petitioners had a reasonable opportunity to comment on this issue No more was required.

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[8] By supplemental notices of January 23, 1964, and June 22, 1964, the Board clearly made an issue of blocked-space agreements (J.A. 115, 137). Petitioners' written and oral comments to the Board demonstrated their awareness that the all-cargo carriers were proposing, and the Board considering, exclusive blocked space rights for the all-cargo carriers (J.A. 130–140, 167, 169, 171). They also had ample oppottunity to comment on the final regulation and its policy justification in their petitions for reconsideration which, with petitions by other interested persons, were carefully considered by the Board in determining whether to set the regulation aside.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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